

1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 1. STATEMENT OF FACTS

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5 By written order entered August 14, 2008, this Court has granted the motion of
6 Plaintiff and Counterdefendant AT&T Corp. for summary judgment. (Docket No. 130.)
7 This Court found that Plaintiff AT&T Corp. is entitled to judgment on the Complaint of
8 Plaintiff AT&T Corp. (Docket No. 1) against Defendant Dataway Inc. dba Dataway Designs
9 in the sum of \$11,534.67, together with prejudgment interest of \$5.69 per day from
10 September 25, 2006, and Counterclaimant Dataway Inc. dba Dataway Designs is entitled to
11 nothing as a matter of law on the Counterclaim of Counterclaimant Dataway Inc. dba
12 Dataway Designs (Docket No. 31). Notwithstanding the intent evidenced by the order
13 granting summary judgment, the Judgment entered by this Court is silent as to the monetary
14 relief granted to Plaintiff AT&T Corp. on its Complaint (Docket No. 131).^{1/}
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16 2. DISCUSSION

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18 (A) WHETHER PURSUANT TO RULE 59(e) OR 60(a), THIS COURT HAS
19 THE POWER TO CORRECT OR AMEND ITS JUDGMENT SO THAT IT
20 CONFORMS TO ITS ORDER ON THE MOTION FOR SUMMARY JUDGMENT
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22 Either on its own initiative or a party's motion, the court is empowered to correct
23 "clerical mistakes" and "errors arising from oversight or omission" in its judgments or
24 Orders. [*F.R.C.P., Rule 60(a).*] A judge may use Rule 60(a) "to make an order reflect the

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28 ^{1/}See F.R.C.P., Form 71.

1 actual intentions of the court, plus necessary implications." [*Jones & Guerrero Co., Inc. v.*
 2 *Sealift Pac.* (9th Cir. 1981) 650 F.2d 1072, 1074.]²

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 4 Rule 60(a) does not allow correction of substantive, or judicial, error: "The basic
 5 distinction between 'clerical mistakes' (correctable under Rule 60(a)) and mistakes that
 6 cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution'
 7 whereas the latter consist of instances where the court changes its mind, either because it
 8 made a legal or factual mistake in making its original determination, or because on second
 9 thought it has decided to exercise its discretion in a manner different from the way it was
 10 exercised in the original determination." [*Blanton v. Anzalone* (9th Cir. 1987) 813 F.2d 1574,
 11 1577, fn. 2; *see Burton v. Johnson* (10th Cir. 1992) 975 F.2d 690, 694 (Trial court may not
 12 clarify judgment to reflect a new and subsequent intent).]³

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 14 A Rule 60(a) motion lies to redress, inter alia:

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 16 (1) Error in reciting or transcribing judgment. [*In re Jee* (9th Cir. 1986) 799
 17 F.2d 532, 535; *Chavez v. Balesh* (5th Cir. 1983) 704 F.2d 774, 776-777; *Allied*
 18 *Materials Corp. v. Superior Prods. Co., Inc.* (10th Cir. 1980) 620 F.2d 224, 226.]

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 21 ²"Judicial error" is distinguished from "clerical error" on the basis of the judge's intent:
 22 "Judicial error" means the judge knowingly rendered the judgment that is now claimed to
 23 be erroneous as a matter of law; "clerical error," on the other hand, cannot be attributed to
 24 the exercise of judicial consideration or discretion and involves errors of oversight or
 omission. [*Jones, Rosen, Wegner & Jones, California Practice Guide: Federal Civil*
Trials and Evidence, "Post-Trial Motions, 20:278-20:278.2.]

25 ³Relief under Rule 60(a) is not limited to mistakes committed by a court clerk: "A
 26 mistake correctable under Rule 60(a) need not be committed by the clerk or the court and
 27 Rule 60(a) is even available to correct mistakes by the parties." [*Matter of West Texas*
Mktg. Corp. (5th Cir. 1994) 12 F.3d 497, 504; *Sherrod v. American Airlines, Inc.* (5th
 28 Cir. 1998) 132 F.3d 1112, 1117; *Alpern v. UtiliCorp United, Inc.* (8th Cir. 1996) 84 F.3d
 1525, 1538-1539; *see In re Jee* (9th Cir. 1986) 799 F.2d 532, 535.]

(2) The omission of matter intended to be included in the judgment. [*Hasbrouck v. Texaco, Inc.* (9th Cir. 1989) 879 F.2d 632, 636 (Trial court failed to award costs and interest.); *Robi v. Five Platters, Inc.* (9th Cir. 1990) 918 F.2d 1439, 1445 (Trial Court failed to include registration numbers and dates of issuance on trademarks designated for cancellation, as required by Trademark Office.).]

(3) Computational error. [*Matter of West Texas Mktg. Corp.* (5th Cir. 1994) 12 F.3d 497, 504.]

Errors of a more substantial nature may be corrected by a motion under Rule 59(e). District courts have power to "alter or amend" a judgment by motion under Rule 59(e). [F.R.C.P., Rule 59(e).] The motion must seek to "alter or amend" the judgment— This means seeking a substantive change of mind by the court, i.e., to correct judicial error as opposed to clerical error. [*Jones, Rosen, Wegner & Jones, California Practice Guide: Federal Civil Trials and Evidence*, "Post-Trial Motions, 20:271.] District courts do not have authority to prohibit a Rule 59(e) motion and they must carefully consider the merits. [*Collins v. Morgan Stanley Dean Witter* (5th Cir. 2000) 224 F.3d 496, 502 (Noting custom of some judges to prohibit litigants from filing motions under Rules 59(e) and 60.)] A substantive motion is one that would result in a substantive alteration of the judgment^{4/} rather than just a clerical

^{4/}A postjudgment motion for prejudgment interest (whether an interest award is mandatory or discretionary) involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply: "In deciding if and how much prejudgment interest should be granted, a district court must examine--or in the case of a postjudgment motion, reexamine--matters encompassed within the merits of the underlying action." [*Osterneck v. Ernst & Whitney* (1989) 489 U.S. 169, 175-176, 109 S.Ct. 987, 991-992; see *McCalla v. Royal MacCabees Life Ins. Co.* (9th Cir. 2004) 369 F.3d 1128, 1130-1134; *Webco Industries, Inc. v. Thermatool Corp.* (10th Cir. 2002) 278 F.3d 1120, 1134.] However, where the judgment awards prejudgment interest but does not set the amount, a postjudgment motion to fix the amount is a Rule 60(a) motion to correct "clerical error". [*Pogor v. Makita U.S.A., Inc.* (6th Cir. 1998) 135 F.3d 384, 387.]

1 correction or change in a purely procedural matter. [*United States v. 47 West 644 Route 38,*
2 *Maple Park, Ill. (7th Cir. 1999) 190 F.3d 781, 782.*] The court's commission of some
3 manifest error of law or fact justifies the grant of a Rule 59(e) motion. [*Turner v. Burlington*
4 *Northern Santa Fe R.R. Co. (9th Cir. 2003) 338 F.3d 1058, 1063.*]

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6 Here, by written order entered August 14, 2008, this Court has granted the motion of
7 Plaintiff and Counterdefendant AT&T Corp. for summary judgment. This Court found that
8 Plaintiff AT&T Corp. is entitled to judgment on the Complaint of Plaintiff AT&T Corp.
9 (Docket No. 1) against Defendant Dataway Inc. dba Dataway Designs in the sum of
10 \$11,534.67, together with prejudgment interest of \$5.69 per day from September 25, 2006,
11 and Counterclaimant Dataway Inc. dba Dataway Designs is entitled to nothing as a matter
12 of law on the Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs (Docket
13 No. 31). Notwithstanding the intent evidenced by the order granting summary judgment, the
14 Judgment entered by this Court is silent as to the monetary relief granted to Plaintiff AT&T
15 Corp. on its Complaint (Docket No. 1).

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17 In order to correct the obvious omission from the judgment on monetary relief, the
18 Judgment should be corrected or amended to state: (1) Plaintiff AT&T Corp. is entitled to
19 judgment on the Complaint of Plaintiff AT&T Corp. against Defendant Dataway Inc. dba
20 Dataway Designs in the sum of \$11,534.67, together with prejudgment interest of \$3,920.41
21 (based upon \$5.69 per day from September 25, 2006 through August 14, 2008 [689 days]);
22 (2) Counterclaimant Dataway Inc. dba Dataway Designs is entitled to nothing on the
23 Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs; and (3) Costs and
24 attorney's fees, if any, shall be claimed and contested in accordance with F.R.C.P., Rule
25 54(d) and Local Rule 54.

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3. CONCLUSION

For the foregoing reasons, this Court should enter an order correcting judgment or, alternatively, amending judgment to state: (1) Plaintiff AT&T Corp. is entitled to judgment on the Complaint of Plaintiff AT&T Corp. against Defendant Dataway Inc. dba Dataway Designs in the sum of \$11,534.67, together with prejudgment interest of \$3,920.41 (based upon \$5.69 per day from September 25, 2006 through August 14, 2008 [689 days]); (2) Counterclaimant Dataway Inc. dba Dataway Designs is entitled to nothing on the Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs; and (3) Costs and attorney's fees, if any, shall be claimed and contested in accordance with F.R.C.P., Rule 54(d) and Local Rule 54.

DATED: August 18, 2008

AIRES LAW FIRM

By: 

Timothy Carl Aires, Esq.
Attorney for Plaintiff and Counterdefendant,
AT&T CORP.